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Supreme Court, U.S.
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No. 05- ____

In the Supreme Court of the United States

JOHN F. TRIPLETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit Court of Appeals' procedural bar rule, as applied, is contrary to this Court's rule that new rules for the conduct of criminal prosecutions must be applied to all cases pending on direct review, or not yet final, the holdings of all other circuit courts of appeals, the Federal Rules of Criminal Procedure and the purposes of the Sentencing Reform Act?

2. Whether the Eleventh Circuit Court of Appeals' procedural bar rule, as applied, justifies its refusal to apply the holdings of this Court's decision in *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005), and this Court's order in *Triplett v. United States*, 125 S.Ct. 994 (2005) (Mem.), granting Petitioner's petition for certiorari, vacating the prior judgment in Petitioner's case, and remanding to the Eleventh Circuit for further consideration in light of *Booker*?

3. Whether this Court should grant certiorari to resolve a split among the courts of appeals regarding how plain error pursuant to *United States v. Booker* should be treated?

PARTIES TO THE PROCEEDING

Petitioner John F. Triplett is an interested party to the proceedings herein.

Respondent is the United States of America.

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STATEMENT OF BASIS FOR JURISDICTION IN THE UNITED STATES SUPREME COURT

The Eleventh Circuit entered its judgment on February 25, 2004, and it affirmed and reinstated its opinion on May 10, 2005. (Appendices A, F.) This Court possesses jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED IN CASE

Petitioner intends to rely upon the following constitutional provisions, statutes and rules:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

U.S.Const.Amend. VI.

> (a) Factors to be considered in imposing a sentence.-- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider- ...

> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct...

18 U.S.C. § 3553.

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106.

> (a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated...
>
> > (5) a statement of the issues presented for review...

Fed.R.App.P. 28.

> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed.R.Crim.P. 52.

STATEMENT OF THE CASE

A. Factual Statement

The Henry Pratt Company ("Pratt"), of Aurora, Illinois, is, *inter alia*, a manufacturer of valves. (R-7-2 & 72-73.) As part of its business, the company makes and sells valves used in nuclear power plants. (R-7-3.) The Parts Department of Pratt is responsible for maintaining Pratt's products throughout the country. (R-7-5.)

From time to time, an existing nuclear power plant customer would need a replacement valve from the Parts Department. (R-7-6.) Petitioner John F. Triplett was, during the relevant time period, a Senior Project Manager of the Parts Department, and the primary Pratt employee knowledgeable in servicing the needs of Pratt's nuclear power plant customers. (R-7-7, 8 & 24.)

Valves could not be used in nuclear power plants unless they met strict quality control requirements, evidenced by a plant certification. (R-7-21-22.) By law, federal nuclear regulatory regime required Pratt to maintain records as to its sales of its valves used in nuclear power plants. (R-7-21-24.) Petitioner was extremely knowledgeable about these requirements and how they impacted Pratt's plant customers. (R-7-8, 9 & 24.)

On some occasions, Pratt nuclear power plant customers might have a need for a replacement nuclear valve. (R-7-25-26, 70 & 73.) A nuclear power plant risked losing over a million and a half dollars of revenue per day if it was forced to shut down due to a valve failure. (R-7-26 & 97-98.) A Pratt customer could buy a new valve from Pratt, but it might take up to 52 weeks for Pratt to manufacture it. (R-7-25 &

73.) As an alternative, Pratt would also offer to acquire a surplus nuclear valve on behalf of its customer, and refurbish and certify it so that it would meet regulatory requirements. (R-7-26-28, 73, 90, 92-93.) By taking this alternative approach, a nuclear power plant could have a lawful certified surplus Pratt valve within 8 weeks, substantially reducing the risk of a potential plant shutdown, with its attendant costs. (R-7-27.) Only Pratt could refurbish and certify one of its surplus valves. (R-7-27-28, 89-90, 91, 100 & 101.)

Pratt never engaged in the acquisition, refurbishment and certification of surplus valves, as part of its regular business. (R-7-28 & 90.) Although Pratt was well aware of the demand for, and opportunity to provide, surplus refurbished and certified valves, it rejected, as a business decision, keeping an inventory of surplus valves which could be refurbished and certified. (R-7-23 & 73.) Thus, only on a case-by-case basis did Pratt agree to acquire, refurbish and certify a surplus valve. That is, only if a customer with a need for such a service contacted Pratt and inquired as to whether Pratt could supply it with such a service would Pratt entertain providing such a service. (R-7-29 & 70-71.)

If a prior Pratt customer contacted Pratt and expressed a desire to obtain a surplus valve, Petitioner had the task of locating a surplus valve which could meet the customer's needs and obtaining a price quote from the vendor. (R-7-31, 33 & 101.) The Petitioner would list the vendor's price quote on a proposal work-up sheet which he would submit to his supervisor, Nicholas Polito. (R-7-75 & 83.)

The proposal work-up sheets were reviewed by Pratt's management. (R-7-77, 79 & 80.) Only after a specific proposal for a Pratt customer was approved by Pratt, was the proposal submitted to Pratt's customer. (R-7-77.) The nuclear

power plant customer possessed the final authority to authorize Pratt to acquire a surplus valve in question. If the customer approved of Pratt's terms, the customer provided a legally binding purchase order to Pratt. (R-7-78 & 79.) If the customer failed to approve the transaction, Pratt would not acquire any surplus valve. Pratt did not acquire any surplus valve without a specific customer consenting to be contractually bound to pay for the refurbished, certified surplus valve. (R-7-77 & 81-82.)

In creating the proposal work-up sheet, Petitioner applied multipliers to the price quote from the vendor to cover Pratt's costs, as well as the gross margin or profit which Pratt sought to make on the potential activity. (R-7-31, 72, 74-75, 94, 76-77 & 99-100.) As testified to by Polito, Pratt sought to make an 85% gross margin or profit on each refurbished, certified surplus valve. (R-7-74, 75 & 115.) Pratt never revealed its pricing scheme to its customers, or Pratt's actual cost in performing the services. (R-7-78.) However, the vendor's price to acquire the surplus valve was revealed to Pratt's customers, who had the opportunity to acquire the valves without Pratt's refurbishing and certification of the valves. (R-14-5-6.) Of course, such a valve could not be used by the nuclear power plant without violating the law.

As stated, Pratt was the only company which could refurbish and certify nuclear valves which Pratt had previously manufactured. (R-7-27-28, 89-90, 91, 100 & 101.) Accordingly, Pratt possessed an effective monopoly over the refurbishment and certification of its nuclear valves. Any nuclear power plant in need of a refurbished and certified *Pratt* nuclear valve therefore had to obtain the valve from Pratt on Pratt's terms, or otherwise risk a plant shutdown over a greater amount of time than necessary.

In 1995, Petitioner entered into a business relationship with Pump, Valves & Equipment d/b/a the Scruggs Company ("Scruggs Company") of Houston, Texas (then a Pratt commission salesman) to acquire 100 Pratt surplus valves. (R-6-146-154.) In turn, the Scruggs Company, owned and operated by brothers Jimmy and Ted, approached Eurotech Industries, owned by Christopher Mealey, and also of Houston, to act as a middleman in the expected sale of the surplus valves to nuclear power plant customers of Pratt. (R-6-157-163.)

Petitioner, acting at the specific request of a Pratt nuclear power plant customer, caused Pratt to acquire for that customer surplus valves from Eurotech, which were then refurbished and certified. Pratt paid Eurotech, which took five percent (5%) for its services and, in turn, remitted the balance of the money to the Scruggs Company which in turn paid Petitioner monies which may be characterized as kickbacks. It is without dispute that Petitioner did not inform Pratt of the nature of his business relationship with the Scruggs Company, the Scruggs Company's relationship with Eurotech and Petitioner's receipt of kickbacks. (R-7-59 & 60.)

B. Proceedings Below

On November 20, 2002 a federal grand jury sitting in the November District of Georgia returned a single count indictment charging Petitioner with conspiring to defraud the Henry Pratt Company by use of the mail and interstate facilities in violation of 18 U.S.C. §§ 371, 1341, 1343 and 1346. A plea of not guilty was entered by Petitioner on December 2, 2002. Trial commenced on April 14, 2003 before the Honorable Charles A. Pannell. A verdict of guilty was returned by the jury on April 18, 2003.

On April 24, 2003 a motion for judgment of acquittal was timely filed. The district court denied the motion. Sentencing of Petitioner was conducted on July 31, 2003. The district court entered its judgment and commitment order on that day, sentencing the Petitioner to imprisonment for 51 months, followed by 36 months supervised release, $100 special assessment, $10,000 fine imposed and $86,512.02 in restitution. (R-14-58.) A notice of appeal of both the conviction and sentence was timely filed on August 6, 2003.

On February 25, 2004, the Eleventh Circuit issued an opinion affirming the decision of the trial court. Petitioner petitioned for rehearing en banc on March 14, 2004. On April 26, 2004, the Eleventh Circuit denied the petition for rehearing en banc. Following the Eleventh Circuit's denial of Petitioner's petition, this Court issued its decision in *Blakely v. Washington*, __ U.S. __ , 124 S.Ct. 2531 (2004).

On August 2, 2004, Petitioner timely filed a petition for a writ of certiorari to this Court raising Sixth Amendment challenges to the sentencing errors in his case. On January 24, 2005, this Court issued an order granting Petitioner's petition, vacating the judgment in his case, and remanding his case to the Eleventh Circuit for further consideration in light of *United States v. Booker...*" *Triplett v. United States*, 125 S.Ct. 994 (2005) (Mem.). (Appendix D.)

On April 5, 2005, the Eleventh Circuit sent notice to Petitioner to file a supplemental letter brief with the court regarding this Court's decision in *Booker*, which Petitioner submitted. On May 10, 2005, the Eleventh Circuit issued an order affirming Petitioner's sentence and reinstating its February 25, 2004, opinion.

REASONS FOR GRANTING THE PETITION

A. This Court should grant the petition to determine whether the Eleventh Circuit Court of Appeals' procedural bar rule, as applied, is contrary to this Court's rule that new rules for the conduct of criminal prosecutions must be applied to all cases pending on direct review, or not yet final, the holdings of all other circuit courts of appeals, the Federal Rules of Criminal Procedure and the purposes of the Sentencing Reform Act.

Following this Court's decision in *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005), this Court granted Petitioner's then-pending petition for certiorari, vacated the judgment and remanded the case "to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *United States v. Booker*..." *Triplett v. United States*, 125 S.Ct. 994 (2005) (Mem.). (Appendix D.) On remand, the Eleventh Circuit relied upon its decisions in *United States v. Dockery*, 401 F.3d 1261 (11th Cir.2005) and *United States v. Ardley*, 242 F.3d 989 (11th Cir. 2001) and applied its "well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned." *United States v. Triplett*, 128 Fed.Appx. 105, 106 (11th Cir. 2005). (Appendix A, p. 2a.) The court then reinstated its previous opinion and affirmed Petitioner's sentence. *Id.* However, the Eleventh Circuit's "rule" has been characterized by former Chief Judge Tjoflat, who dissented from the denial of rehearing en banc in *Ardley*, as "a strange, bad rule...," *United States v. Vanorden*, No. 03-11083, 2005 WL 1531151, at *2 (11th Cir. June 30, 2005) (Tjoflat, J., concurring specially), "inconsistent with Supreme Court precedent, squarely in conflict with the decisions of every other circuit, and, notwithstanding all else, quite simply an

imprudent application of a prudential rule." *United States v. Higdon*, No. 03-14365, 2005 WL 1677544, at *7 (11th Cir. July 8, 2005) (Tjoflat, J., dissenting from denial of rehearing en banc) (citing *United States v. Levy*, 391 F.3d 1327, 1335-51 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc)).

This Court, in *Griffith v. Kentucky*, held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases... pending on direct review or not yet final." 479 U.S. 314, 328 (1987). This Court further expressly incorporated its holding in *Griffith* in its holding in *Booker*. 125 S.Ct. at 769 (quoting *Griffith* at 328). Both Judge Tjoflat and Judge Barkett, dissenting from the denial of rehearing en banc in *United States v. Levy*, recognized that there is nothing in *Griffith* which limits its holding to defendants who raise a new constitutional rule in their initial brief on appeal. 391 F.3d at 1339 (Tjoflat, J., dissenting from denial of rehearing en banc) (citing *Griffith*, 479 U.S. at 323); *id.* at 1351-52 (Barkett, J., dissenting from denial of rehearing en banc). As Judge Tjoflat observed, this Court has never drawn any distinction among defendants for the purposes of applying new rules retroactively to all cases on direct review, or not yet final, other than whether cases are on direct, versus collateral, review. *Id.* at 1338 (quoting *Teague v. Lane*, 489 U.S. 288, 310 (1989)).

Despite this fact, as Judge Tjoflat recognized in *Ardley*, the Eleventh Circuit's rule that arguments not raised in initial briefs are held to be abandoned or waived unjustifiably imposes "an additional hurdle to the retroactive application of an intervening Supreme Court decision," *United States v. Ardley*, 273 F.3d 991, 1000 (11th Cir. 2001) (Tjoflat, J., dissenting from denial of rehearing en banc), requiring that a defendant's case not only be pending on direct review or not

yet final, but also that the defendant "presage[ ] the intervening decision by raising the issue addressed by that decision in the [defendant's] initial brief on appeal," *id.* at 999.[1] This additional hurdle imposed by the Eleventh Circuit, which is derived from Federal Rule of Appellate Procedure 28(a)(5), unnecessarily narrows the class of defendants who can receive the benefit of retroactive application of a new rule for the conduct of criminal prosecutions announced by this Court. *Id.* at 1000. The Eleventh Circuit's procedural rule clearly violates this Court's holding in *Griffith* that "selective application of new rules violates the principle of treating similarly situated defendants the same..." *Id.* at 998 (quoting *Griffith*, 479 U.S. at 323). Such selective application "impugns the integrity of judicial review." *Id.* at 1000.[2]

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[1] In *Shea v. Louisiana*, this Court made a reference to "principles of waiver" in holding that the Court's decision in *Edwards v. Arizona*, 451 U.S. 477 (1981), where the Court had held that a police-initiated interrogation of a defendant without the presence of an attorney, after the defendant had requested an attorney, violated the Fifth and Fourteenth Amendments, applied retroactively to the petitioner's case, despite the fact that *Edwards* was decided after the petitioner had appealed to the Louisiana Supreme Court. 470 U.S. 51, 53, 54, 59 (1985). (Response at 9, 10 n.2.) However, other language by the Court in *Shea* suggests that the constitutional principle that retroactivity of new rules for the prosecution of criminal cases overrides the procedural rule that issues not raised in an appellant's initial brief on appeal are waived: "[h]ad petitioner's case been pending here on certiorari when *Edwards* was announced, it surely would have been remanded, as were other such cases, for reconsideration in the light of *Edwards*." Id. at 55 (citations omitted).

[2] As recognized by Judge Tjoflat, the Eleventh Circuit's "longstanding practice to consider only claims actually presented in initial briefs... [actually] dates back less than four years to *Ardley*." *Levy*, 391 F.3d at 143-44 (Tjoflat, J., dissenting from the denial of

Furthermore, in addition to unjustifiably limiting *Griffith*, the Eleventh Circuit's procedural bar rule ignores this Court's holding in *United States v. Olano*, that "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" 507 U.S. 725, 733-34 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see also Levy*, 391 F.3d at 1350. "'Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under [Federal Rule of Criminal Procedure] 52(b).'" *Olano* at 733. Judge Tjoflat recognized, in his concurrence in *United States v. Vanorden*, "[a]t the time the supposed waiver took place... *Blakely* and *Booker* had not yet been decided, [fn.] and this circuit and every other had squarely rejected *Blakely/Booker*-type arguments." 2005 WL 1531151 at *3 (internal footnote omitted) (Tjoflat, J., concurring specially).

In addition, the Eleventh Circuit's application of its rule that issues not raised in a defendant's opening brief are considered waived to Sixth Amendment challenges pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004), and *Booker* "continues a circuit split that finds this court standing alone." *Levy*, 391 F.3d at 1336-37. *See United States v. Crosby*, 397 F.3d 103, 106, 116 n.16 (2d Cir. 2005)

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rehearing en banc). Furthermore, *Ardley* relied entirely on *United States v. Miller*, 492 F.2d 37 (5th Cir. 1974), for its holding, in which the former Fifth Circuit Court of Appeals opinion held that this Court's decision in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) announced a new rule that border searches not conducted at the border must be supported by probable cause. 492 F.2d at 40. However, unlike *Booker*, this Court in *Almeida-Sanchez* did not expressly state that its rule was to be applied to all cases on direct review.

(appellant argued for the first time at oral argument that the enhancements violated his Sixth Amendment rights, held that court was "obliged to apply *Booker/Fanfan* to this case because it is pending on direct review"); *United States v. Walker*, Nos. 02-2168, 03-1528, 2005 WL 1503888, at *3 (3d Cir. June 27, 2005) (vacating the appellant's sentence on one count for plain error, regardless of the fact that "[i]n supplemental briefing, Walker assert[ed] for the first time an *Apprendi /Booker* violation of his Sixth Amendment rights with regard to [that count]"); *United States v. Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005) ("[a]lthough appellate contentions not raised in an opening brief are normally deemed to have been waived, the *Booker* principles apply in this proceeding because the Court specifically mandated that we 'must apply [*Booker*]... to all cases on direct review'") (quoting *Booker*, 125 S.Ct. at 769); *United States v. McDaniel*, 398 F.3d 540, 546 (6th Cir. 2005); *United States v. Ameline*, No. 02-30326, 2005 WL 1291977, at **1, **3 (9th Cir. June 1, 2005) (en banc) ("[e]ven where the *briefs* filed by the parties do not raise a *Booker* objection... the issue may be raised and *should* be considered") (citing *Booker*, 125 S.Ct. at 769); *United States v. Lang*, 405 F.3d 1060, 1063 (10th Cir. 2005) (holding that court was required to evaluate the appellants' appeals in light of *Booker* where appellants raised a Sixth Amendment challenge to their sentences for the first time in their petition for writ of certiorari). The Eleventh Circuit's approach further constitutes an aberration among the circuit courts of appeals in that other courts, at minimum, at least consider an appellant's *Booker* claim pursuant to this Court's "plain error" test.

Furthermore, as observed by Judge Tjoflat, dissenting from the denial of rehearing en banc in *Higdon*:

> District courts in the Eleventh Circuit sentence approximately ten percent of all defendants sentenced in the federal courts. [Fn.]. Accordingly, while ninety percent of all defendants who did not raise *Blakely/Booker* claims in their initial briefs (for the imminently sensible reason that such claims were squarely foreclosed by then-controlling precedent) will be permitted to raise these now-viable claims in some sort of supplemental filing, the similarly situated ten percent who were sentenced in our circuit [fn.] will be precluded from doing so for no other reason than that they were sentenced in our circuit.

2005 WL 1744939 at *11 (internal footnotes omitted) (Tjoflat, J., dissenting from denial of rehearing en banc). Judge Tjoflat also recognized that the Eleventh Circuit's aberrant approach would result in defendants who happen to be sentenced in the Eleventh Circuit being treated differently, and receiving different sentences, from similarly situated defendants who happen to be sentenced in another circuit, *id.* at *12, and would be directly contrary to the express purpose of the Sentencing Reform Act "to 'avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,'" *id.* at *11 (quoting 18 U.S.C. § 3553(a)(6); citing Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 104 (1998)).

Petitioner's case was unquestionably pending on direct review and was not yet final at the time this Court announced its new rule in *Blakely* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 124 S.Ct. at 2536. Moreover, Petitioner's case was still on direct review

when this Court extended its holding in *Blakely* to the United States Sentencing Guidelines in *Booker*. 125 S.Ct. at 746, 755. In its decision on remand from this Court, the Eleventh Circuit has disregarded both this Court's rule in *Griffith* that a new rule must be applied retroactively to all cases on direct review, as well as this Court's instruction in *Booker* that its holdings were to be applied to all cases on direct review. At minimum, the court should have considered whether Petitioner's claims satisfied the plain error test.

In accordance with Judge Tjoflat's thorough critique of the Eleventh Circuit's anomalous and unjustified application of its rule that issues not raised in an initial brief on appeal are deemed to be waived, application of the rule to Petitioner results in precisely the sort of selective application of new constitutional rules condemned by this Court in *Griffith*. Petitioner is similarly situated to Booker and all other defendants whose cases were pending on direct review or not yet final at the time this Court issued its decisions in *Blakely* and *Booker*. *See United States v. Milan*, 398 F.3d 445, 453 (6th Cir. 2005) ("Booker's Sixth Amendment challenge *first appeared in a supplemental brief to the Seventh Circuit, which he filed soon after the Supreme Court's decision in Blakely*") (emphasis added). However, in being subject to the Eleventh Circuit's solitary approach to *Booker* error, Petitioner was subject to different treatment than a similarly situated defendant in nearly every other circuit. This unfair result is especially random and fortuitous in Petitioner's case, since the conduct which formed the basis for the charge against the Petitioner occurred almost exclusively in the Fifth and Sixth Circuits—not the Eleventh Circuit.

Furthermore, holding that Petitioner has "abandoned" or "waived" any ability to claim *Booker* error is clearly contrary to the distinction between "waiver" and "forfeiture"

acknowledged by this Court in *Olano*, as well as an unjustifiable limitation on an appellate court's scope of review, pursuant to Rule 52(b). As a result of the fact that, at the time Petitioner submitted his initial brief to the Eleventh Circuit, the Eleventh and every other circuit had definitively held that the rule of *Apprendi* did not apply to the sentencing guidelines, "there was no 'known right' for [Petitioner] to have 'intentionally relinquished,' and his omission is a clear example of a 'forfeiture,' not a 'waiver.'" *Levy*, 391 F.3d at 1350 (Tjoflat, J., dissenting from denial of rehearing en banc). Rather, the Eleventh Circuit's summary affirmance on the basis of its procedural bar rule is tantamount to penalizing Petitioner "for not having the foresight to predict *Blakely*..." *Id.* at 1352 (Barkett, J., dissenting from denial of rehearing en banc). Judge Barkett recognized in her dissent in *Levy* the dilemma posed by the Eleventh Circuit's approach to defendants in Petitioner's shoes: "This is the classic case of a catch-22: defendants can only raise *Blakely* if they have already raised *Apprendi*, and yet this court (and every other circuit) said specifically that they couldn't have raised *Apprendi*!" *Id.* at 1354.

The Sixth Circuit Court of Appeals has expressly considered the issue of waiver of Sixth Amendment claims pursuant to *Blakely* and *Booker* in *McDaniel*, where the appellants appealed before this Court issued its opinions in *Blakely* or *Booker*, holding that:

> [N]either [of the appellants] has waived his right to raise a *Booker*-based challenge to his sentence. "[W]aiver is the intentional relinquishment or abandonment of a known right." [Cit.]. Because neither *Booker* nor *Blakely* had been decided when [appellants] were sentenced or when the parties' briefs were due to this court, and because neither [of the

> appellants] has taken any affirmative steps manifesting an intention to relinquish or abandon *Booker* rights, our review of [appellants'] *Booker* claims *is not foreclosed by the waiver doctrine*.

398 F.3d at 546 (internal citations omitted; emphasis added) (citing *Olano*, 507 U.S. at 733; *United States v. Stines*, 313 F.3d 912, 917 (6th Cir. 2002), *cert. denied*, 540 U.S. 973 (2003)).

Application of the Eleventh Circuit's procedural bar in cases such as Petitioner's is further, as held by Judge Tjoflat in *Vanorden*:

> [E]specially pernicious because it constitutes an absolute, across-the-board bar to claims such as the one we refuse to consider here. These claims are now barred on both direct appeal and collateral review, and they also cannot form the basis of an ineffective assistance of counsel claim, [cit.]... [Fn.] The upshot [the] rule, therefore, is that a Supreme Court decision that we are directed to apply retroactively to all cases still pending on direct review [cits.] will not apply at all to cases on direct review like this one.

Vanorden, 2005 WL 1531151 at *5 (Tjoflat, J., concurring specially) (internal citation and footnote omitted) (citing *Levy*, 391 F.3d at 1334 n.3 (Hull, J., concurring in denial of rehearing en banc); *Ardley*, 273 F.3d at 993-94 (Carnes, J., concurring in denial of rehearing en banc); *Booker*, 125 S.Ct. at 769; *Griffith*, 479 U.S. at 328). Thus, the Eleventh Circuit's unique rule will result in an absolute bar to Petitioner's ability to assert sentencing error under *Booker*. The rule effectively renders this Court's holdings in *Booker* prospective rather than retroactive, in application. *Ardley*,

273 F.3d at 1000 (Tjoflat, J., dissenting from denial of rehearing en banc).

A final argument against application of Eleventh Circuit's procedural bar rule to new rules for criminal prosecutions is Judge Tjoflat's recognition that such a rule "sends a clear message to appellate counsel that they should brief any claim that passes the laugh test regardless of whether it has any support in, or is even squarely foreclosed by, our own precedent." *Levy*, 391 F.3d at 1348 (Tjoflat, J., dissenting from denial of rehearing en banc). The rule accordingly will result in "great harm to the fair and efficient administration of justice in this circuit." *Id.* at 1350.

For these reasons, this Court's rule of retroactive application of constitutional new rules to all cases pending on direct review must necessarily trump any prudential rule that issues not raised in an initial brief are abandoned, in accordance with Judge Tjoflat's conclusion in *Levy*. 391 F.3d at 1350 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc). As observed by Judge Barkett:

> The procedural bar rule... does not serve as its own authority, but derives its legitimacy from the extent to which it serves other legal and institutional values. As such, the rule is subject to countervailing legal and institutional norms... To avoid a constitutional conflict with *Griffith*, Fed. R.App. P. 28(a)(5) should be read to exclude issues that are raised by a new rule of criminal procedure announced after a defendant has filed his initial appellate brief.

Id. at 1354 (Barkett, J., dissenting from denial of rehearing en banc). The Eleventh Circuit's application of its procedural bar rule in Petitioner's case was contrary to this Court's

constitutional holdings and express direction in both *Griffith* and *Booker*, as well as to the Federal Rules of Criminal Procedure, the purposes of the Sentencing Reform Act, and, as fully argued below, the mandate of this Court in granting Petitioner's petition, vacating the judgment in his case, and remanding to the Eleventh Circuit for further consideration in light of *Booker*. The Eleventh Circuit has disregarded this Court's direction in an effort to summarily dispose of Petitioner's case, in violation of Petitioner's right to due process. Furthermore, the Eleventh Circuit is only court to dispose of claims pursuant to this Court's decision in *Booker* in this manner. Consistent with the purposes of the Sentencing Reform Act, there should be uniformity throughout the country in the application of this Court's holdings in *Booker*. For the reasons set forth herein, this Court should grant certiorari to consider the Eleventh Circuit's application of its procedural bar rule, and to resolve the conflict between the Eleventh Circuit and the other circuit courts of appeals, in keeping with Judge Tjoflat's expressed hope in *Vanorden* that "this court sitting en banc, or the Supreme Court, will soon correct this practice." 2005 WL 1531151 at *6 (11th Cir. Jun. 30, 2005) (Tjoflat, J., concurring specially).

B. This Court should grant the petition to determine whether the Eleventh Circuit Court of Appeals' procedural bar rule, as applied, justifies its refusal to apply the holdings of this Court's decision in *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005), and this Court's order in *Triplett v. United States*, 125 S.Ct. 994 (2005) (Mem.), granting Petitioner's petition for certiorari, vacating the prior judgment in Petitioner's case, and remanding to the Eleventh Circuit for further consideration in light of *Booker*.

The Eleventh Circuit's refusal to reconsider Petitioner's case pursuant to this Court's holdings in *Booker* is in direct contravention of this Court's order granting Petitioner's petition, vacating his sentence and remanding to the Eleventh Circuit for "further consideration in light of *United States v. Booker*..." *Triplett v. United States*, 125 S.Ct. 994 (2005) (Mem.). In applying its procedural rule that issues not raised in an opening brief are considered abandoned to Petitioner's *Blakely* claims, the Eleventh Circuit emphatically has not "considered" Petitioner's case "in light of" *Booker*, pursuant to this Court's mandate. By the Eleventh Circuit's own description of its rule, the court "does *not consider Blakely*, now *Booker*, issues not raised in any way in a party's initial brief..." *United States v. Levy*, No. 01-17133, 2005 WL 1620719, at *5 (11th Cir. July 12, 2005) (emphasis added).[3] Such conduct by the Eleventh Circuit was a usurpation of this Court's authority. No authority cited by the Eleventh Circuit in its decision in Petitioner's case support its action or have

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[3] Petitioner, in his letter brief to the Eleventh Circuit following the remand from this Court, clearly argued against the Eleventh Circuit applying its procedural bar rule in light of this Court's mandate. (Appendix B.)

any relationship whatsoever to this Court's holdings in *Booker*. (Appendix A.)

This Court has the power to issue orders granting a defendant's petition for certiorari, vacating the defendant's sentence and remanding to a lower court for further consideration in light of an intervening decision by this Court—known as "GVR" orders—pursuant to 28 U.S.C. § 2106 and its discretionary certiorari jurisdiction. *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166 (1996). GVR orders are an "integral" part of this Court's practice. *Id.* As this Court has held:

> [A] GVR order guarantees to the petitioner *full and fair consideration of his rights in light of all pertinent considerations*... [A] GVR order both promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments *that were not previously before it*.

Stutson v. United States, 516 U.S. 193, 197 (1996) (emphasis added). This Court's GVR orders further:

> [A]lleviate[ ] the '[p]otential for unequal treatment' that is inherent in our inability to grant plenary review of all pending cases raising similar issues. [Cits.]. Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination *may determine the*

> *ultimate outcome of the litigation*, a GVR order is, we believe, potentially appropriate.

Lawrence at 167 (emphasis added; internal citations omitted) (quoting *United States v. Johnson*, 457 U.S. 537, 555, n.16 (1982); citing *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987)). Such orders "improve the fairness and accuracy of judicial outcomes..." *Id.* at 168. In *Lawrence*, this Court observed that it was proper to issue GVR orders "in cases in which recent events have cast substantial doubt on the correctness of the lower court's summary disposition." *Id.* at 170.

The Eleventh Circuit has characterized this Court's GVR orders as mere "boilerplate orders [which] come out in bushels baskets full," *Ardley*, 273 F.3d at 994 (Carnes, J., concurring in denial of rehearing en banc), and which do not require the court to disregard application of its prudential rules. The court's application of the procedural bar rule in Petitioner's case effectively negates and frustrates this Court's remand order, as Judge Tjoflat noted in his dissent in *Ardley*. 273 F.3d at 1006 (Tjoflat, J., dissenting from denial of rehearing en banc). Relying on this Court's decision in *Stutson*, Judge Tjoflat observed in his dissent in *Vanorden* that:

> First, to "guarantee [ ] ... full and fair consideration" of all of a person's "rights" implies more than to permit review of those issues that were previously raised in the court of appeals. Second, a GVR order does not "promote[ ] fairness" if the court of appeals refuses to give the case "further consideration in light of" the very decision that triggered the GVR, as the defendant is then no better off than he was before the GVR. Third, if one purpose of a GVR order is for the

> court of appeals "to consider ... arguments that were not previously before it," then [the court of appeals] thwart[s] that purpose by failing to consider *Booker* issues in cases like this one.

2005 WL 1531151 at *5.

It is clear that the Eleventh Circuit, in applying its procedural bar rule, did not accord Petitioner "full and fair consideration of his rights in light of all pertinent considerations..." *Stutson*, 516 U.S. at 197, pursuant to this Court's GVR order. The Eleventh Circuit's decision entirely negated the purpose of this Court's GVR order to allow it to consider arguments which were not before the court on the initial appeal. The court's application of the procedural bar rule without proper consideration of Petitioner's Sixth Amendment claims was unfair to Petitioner and left Petitioner "no better off than he was before the GVR." *Vanorden*, 2005 WL 1531151 at *5. Moreover, in addition to Petitioner, Levy and Vanorden, the Eleventh Circuit has applied its rule in other cases where this Court has issued a GVR order expressly remanding for further consideration in light of *Booker*. *See United States v. Rivas*, 132 Fed.Appx. 818, *1 (11th Cir. 2005) (per curiam); *United States v. Banks*, No. 03-00196, 2005 WL 1350658, at *1 (11th Cir. June 8, 2005) (per curiam); *United States v. Nieves-Bogado*, No. 04-20019, 2005 WL 1370248, at *2 (11th Cir., June 9, 2005) (per curiam); *United States v. Mohammed*, No.-01-11738, 2005 WL 1412068, at *1 (11th Cir. June 16, 2005); *United States v. Morales*, No. 03-16108, 2005 WL 1412056, at *1 (11th Cir. June 16, 2005) (per curiam); *United States v. Smith*, No. 03-15299, 2005 WL 1662128, at *4 (11th Cir. July 18, 2005) (per curiam). This Court should accordingly grant Petitioner's petition to determine the question of what consideration a lower court must give to a GVR order by this Court directing

the court to further consider a defendant's case in light of an intervening decision by this Court announcing a constitutional new rule.

C. This Court should grant the petition to resolve a split among the courts of appeals regarding how plain error pursuant to *United States v. Booker* should be treated.

Under the "plain error test" formulated by this Court, where an error was not raised below, an appellate court may correct an "(1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Cotton*, 535 U.S. 625, 631 (2002) (quotations and internal marks omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

As has been shown, the Eleventh Circuit does not consider Sixth Amendment challenges pursuant to *Booker* for plain error or otherwise where an appellant lacked the foresight to raise the challenge in his or her opening brief. However, this Court in its remedial opinion in *Booker* clearly instructed courts to review claims not raised below for plain error. *Booker*, 125 S.Ct. at 769. Apart from the Eleventh Circuit's anomalous treatment of a particular class of defendants, all the courts of appeals have done so. Petitioner is accordingly entitled to have the sentencing errors in his case reviewed for plain error.

An additional reason for granting the petition is that it provides an opportunity for this Court to settle a split among the courts of appeals regarding an appellant's burden pursuant to the third prong of the plain error test in cases arising under *Booker*—determining whether a sentencing error affected a

defendant's "substantial rights"—and the related question of who should make the determination. The First, Fifth, Eighth, Tenth, Eleventh Circuits and District of Columbia Circuits have placed the burden on a defendant to show a reasonable probability that the sentencing court would have imposed a lower sentence had it been aware of the advisory nature of the guidelines. *See United States v. Antonakopoulos*, 399 F.3d 68, 81 (1st Cir. 2005); *United States v. Villegas*, 404 F.3d 355, 364 (5th Cir. 2005); *United States v. Rodriguez-Ceballos*, 407 F.3d 937, 941 (8th Cir. 2005); *United States v. Hauk*, 412 F.3d 1179, 1195 (10th Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291, 1301 (11th Cir. 2005); *United States v. Coles*, 403 F.3d 764, 767 (D.C.Cir. 2005). In contrast, the Second, Third, Fourth, Sixth, Seventh and Ninth Circuits appear to have held that there is error affecting a defendant's substantial rights where his or her sentence was enhanced by facts not admitted by the defendant or found by a jury, or the defendant was sentenced pursuant to mandatory guidelines, or both. *See Crosby*, 397 F.3d at 114-15; *United States v. Davis*, 407 F.3d 162, 164 (3d Cir. 2005); *United States v. Hughes*, 401 F.3d 540, 548-49 (4th Cir. 2005); *United States v. Oliver*, 397 F.3d 369, 379-80 (6th Cir. 2005); *United States v. Paladino*, 401 F.3d 471, 483 (7th Cir. 2005); *United States v. Ameline*, 409 F.3d 1073, 1081 (9th Cir. 2005). These courts have refused to place a heavy burden on a defendant under the third prong, realizing that "the record in very few cases will provide a reliable answer to the question of whether the judge would have imposed a different sentence had the Guidelines been viewed as advisory." *Ameline* at 1078.

A split has further developed among the circuits as to the proper procedure in cases of asserted *Booker* error. The Second Circuit has held that, in general, remand to the district court is appropriate in cases of claimed *Booker* error so that

the sentencing judge may determine whether to resentence. *Crosby*, 397 F.3d at 117. In contrast, in the First, Fifth, Eighth and Eleventh Circuits, the courts of appeals conduct the plain error review. *See Antonakopoulos*, 399 F.3d at 80 (1st Cir.2005); *United States v. Mares*, 402 F.3d 511, 521-22 (5th Cir.2005); *United States v. Pirani*, 406 F.3d 543, 552 (8th Cir.2005) (en banc); *Rodriguez*, 398 F.3d at 1301. The Seventh, Ninth and District of Columbia Circuits have adopted a middle approach of a "limited remand" to the sentencing court, while retaining jurisdiction, in order for the sentencing court to determine whether it would have imposed a different sentence had it known of the advisory nature of the guidelines. *See Paladino*, 401 F.3d at 483 (7th Cir. 2005); *Ameline*, 409 F.3d 1073, 1074 (9th Cir. 2005); *Coles*, 403 F.3d 764, 770 (D.C.Cir. 2005). Remand to the district court is appropriate as a result of the fact that the reviewing court "simply do[es] not know whether the sentencing judge would have imposed the same sentence had he known that the sentencing guidelines were advisory, rather than mandatory." *Ameline* at 1080.

The sentencing errors in Petitioner's case should be reviewed for plain error, following *Booker* and this Court's GVR order. In the event that this Court grants certiorari on the other questions raised by Petitioner herein, this Court should also grant certiorari on this question in order to resolve the proper burden in establishing that an error has affected a defendant's substantial rights under third prong of the plain error test, in view of these divisions among the circuit courts of appeals. This Court should further grant certiorari in order to decide who should properly make that determination—the appellate court or the sentencing court. The need for uniformity in apply this Court's holdings in *Booker* urges this Court to resolve these differing approaches.

CONCLUSION

Based upon the foregoing petition, this Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03-14099 Non-Argument Calendar

[Filed, May 10, 2005]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN F. TRIPLETT,
Defendant-Appellant.

OPINION

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

PER CURIAM

This case is before the court for consideration in light of *United States v. Booker*, 543 U.S. , 160 L. Ed. 2d 621, 125 S.Ct. 738 (2005). We previously affirmed Triplett's conviction and sentence. See *United States v. Triplett*, 99 Fed. Appx. 882, No. 03-14099 (11th Cir. Feb. 25, 2004) (unpublished). The Supreme Court vacated our prior decision

and remanded the case to us for further consideration in light of Booker.

Triplett did not raise a Sixth Amendment objection -- or any other constitutional or legal objection based on the issues addressed by the Supreme Court in *Booker,* or *Blakely v. Washington,* 542 U.S. , 159 L. Ed. 2d 403, 124 S.Ct. 2531 (2004) -- either in the district court or in this court on appeal of his conviction and sentence. Nor did Triplett dispute any of the underlying facts on which his sentence rested. Following our affirmance of Triplett's conviction and sentence, Triplett petitioned for rehearing, but again did not raise any *Booker/Blakely* claim. This court denied the petition for rehearing on April 26, 2004.

Triplett filed a petition for writ of certiorari in the United States Supreme Court on July 22, 2004, in which he raised as an issue for the first time "whether or not judicial enhancements pursuant to the United States Sentencing Guidelines constitute a denial of the Sixth Amendment right to trial by jury."

In *United States v. Dockery,* 401 F.3d 1261, 1262-63 (11th Cir. 2005), after the Supreme Court's remand with instructions to reconsider our opinion in light of *Booker,* we relied on our earlier case of *United States v. Ardley,* 242 F.3d 989 (11th Cir. 2001), which observed:

> Nothing in the *Apprendi* opinion requires or suggests that we are obligated to consider an issue not raised in any of the briefs that appellant has filed with us. Nor is there anything in the Supreme Court's remand order, which is cast in the usual language, requiring that we treat the case as though the *Apprendi* issue had been timely raised in this Court. . . . In the absence of

> any requirement to the contrary in either *Apprendi* or in the order remanding this case to us, we apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned.

Ardley, 242 F.3d at 990 (citations omitted). Thus, because *Dockery* had not asserted an *Apprendi* (or its progeny) challenge to his sentence, we reinstated our previous opinion. *Dockery*, 401 F.3d at 1263.

After our reconsideration of this case in light of *Booker*, we reinstate our previous opinion in this case and affirm Triplett's conviction and sentence. Like the appellant in *Dockery*, Triplett did not assert *Apprendi* error (or its progeny) in his initial brief on appeal.

OPINION REINSTATED IN PART; CONVICTION AND SENTENCE AFFIRMED.

APPENDIX B

April 15, 2005

VIA FACSIMILE AND FIRST CLASS UNITED STATES MAIL

Thomas K. Kahn Clerk
United States Court of Appeals
Eleventh Circuit
Elbert Parr Tuttle Court of Appeals Building
56 Forsyth Street, NW
Atlanta, Georgia 30303

Re: *United States v. Triplett*
No. 03-14099

Dear Mr. Kahn:

Pursuant to your memorandum of April 5, 2005, please find herein the letter brief on behalf of Mr. Triplett.

TRIPLETT SUPPLEMENTAL LETTER BRIEF

(1) Description of where, when, and how the Booker issue was first raised, quoting or attaching a copy of the pertinent part of any relevant written documents (pleadings, transcripts, or briefs) showing that it was.

John F. Triplett raised the *Booker* issue ("[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the proscribed statutory maximum must be

submitted to a jury, and proved beyond a reasonable doubt," *Blakely v. Washington* --- U.S. ---, 124 S.Ct. 2531, 2536 (2004), extended by the Court to the United States Sentencing Guidelines ("Guidelines") in *United States v. Booker*, 543 U.S. ---, 125 S.Ct. 738, 746, 755 (Jan. 12, 2005) (Stevens, J.)), in his petition for writ of certiorari to the United States Supreme Court, filed on July 28, 2004, relevant portions of which are submitted as Exhibit A. On January 24, 2005, the Supreme Court issued an Order granting Mr. Triplett's petition, vacating the judgment of this Court and remanding "the case" to this Court "for consideration in light of *United States v. Booker*, 543 U.S. ____ (2005)." (*See* Order of United States Supreme Court, January 24, 2005 ("Order").

(2) Arguments about whether and how the Booker decision applies to this case and what action this Court should now take in this case.

(A) *Booker* must be applied to "this case"

As will be shown below, *Booker* applies to "this case". Accordingly, this Court should vacate the judgment and conviction of Mr. Triplett and remand the case to the district court for resentencing. As expressed in the majority opinion authored by Justice Breyer (the remedial opinion), *Booker* applies "to all cases on direct review." *United States v. Booker*, 543 U.S. ---, 125 S.Ct. 738, 769 (Jan. 12, 2005) (Breyer, J.) "As these dispositions indicate, we must apply today's holdings – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – *to all cases on direct review. See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L.Ed.2d 649 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively

to *all cases... pending on direct review or not yet final...*"). *Id.* (emphasis added)[1]

Under *Griffith*, a case is "final" when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." 479 U.S. at 321, n. 6 (citing *United States v. Johnson*, 457 U.S. 537, 542, n. 8 (1982); citing *Linkletter v. Walker*, 381 U.S. 618, 622, n. 5 (1965)). Mr. Triplett's case clearly was "not yet final" and "on direct review" under *Griffith* when *Booker* was rendered as Mr. Triplett's then pending petition for certiorari had not been "finally denied". Indeed, it was granted after *Booker* was rendered.

Booker applies to "this case" notwithstanding the recent decision by this Court in *United States v. Dockery*, --- F.3d —, 2005 WL 487735, *1 (11th Cir., Mar. 03, 2005) (citing *United States v. Ardley*, 242 F.3d 989 (11th Cir. 2001)) which on close analysis failed to apply *Booker* contrary to the remand of the Supreme Court. The Court in *Ardley* declined to consider a challenge to the applellant's sentence where "[t]he Supreme Court [had] vacated [the] prior judgment and remanded the case for further consideration in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)," citing as support *United States v. Miller*, 492 F.2d 37, 40 (5th Cir.1974)). *Ardley*, 242 F.3d at 989.

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[1] The Court further stated: "That fact does not mean that we believe that every sentence gives rise to a Sixth Amendment violation. Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining for example, whether the issue was raised below and whether it fails the "plain-error" test." *Id.*

In *Miller*, the Supreme Court had vacated the judgment of the Fifth Circuit and "remanded the cause [ ] for further consideration in light of *Almeida-Sanchez v. United States*, 1973, 413 U.S. 266..." *Miller* at 38. In *Almeida-Sanchez*, a search and seizure case, a "new rule" regarding border searches was announced. However, the *Miller* court noting that the Supreme Court had not indicated whether the new rule was to be retroactively applied decided that it should not. 492 F.2d at 40-41. ("Thus, the fact that our judgment was vacated and the case remanded for further consideration in light of *Almeida-Sanchez*, particularly when the retroactivity issue had not been considered by this Court, does not imply that *Almeida-Sanchez* is necessarily retrospectively applicable to cases tried before it was granted.") *Id.* The *Ardley* court relying on *Miller* subsequently held that *"[i]n the absence of any requirement to the contrary* in either *Apprendi* or in the order remanding this case to us, we apply our well-established rule that issues and contentions not timely raised in briefs are deemed abandoned." *Ardley*, 242 F.3d 989. (emphasis added)

Here, the Order by the Supreme Court remanded "this case" to this Court "for further consideration in light of *Booker v. United States*, 543 U.S. ___ (2005)." The Order did not remand "this case" for further consideration of *Apprendi* which the *Ardley* court found did not "require or suggest [the Court of Appeals was] obligated to consider an issue not raised in any of the briefs that [had been] filed with [it]." *Ardley*, at 989. Consequently, the *Dockery* court misapplied the holding in *Ardley* as clearly *Booker*, the case this Court and the *Dockery* court were directed by the Supreme Court to consider, is distinguished from *Apprendi* which was the subject of *Ardley*, as the Supreme Court directed that *Booker* applied to *all* cases *which were not final* pursuant to *Griffith* when *Booker* was rendered. (emphasis

added)[2] "This case" was not final when *Booker* was decided as Mr. Triplett's petition for certiorari was *granted* twelve days *after Booker* was rendered. Therefore, this Court must apply *Booker* to "this case."[3]

In applying *Booker*, this Court is expected "to apply ordinary prudential doctrines determining, for example, whether the issue was raised below *and* whether it fails the "plain error 'test'". *Booker* at ____. (emphasis added) Thus, this Court must determine not only whether the "issue was raised below, but also "whether it fails the 'plain error' test". Whether the so-called *Booker* issue may be deemed abandoned under an *Ardley* analysis does not by itself resolve whether the remedial aspects of *Booker* apply to "this case". That is so because there must also be in conjunction with that test a determination made by the reviewing court under the "plan error" test. The *Dockery* court misapplied or failed to apply the *Booker* holding when it justified its reinstated judgment solely on a finding of abandonment without regard

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[2] Clearly, the *Dockery* court erred contrary to the remand of the Supreme Court by simply applying *Ardley* decided before *Booker* as under *Ardley* a reviewing court never would reach a "plain error" test contrary to *Booker, infra.*

[3] The real issue is not whether *Booker* applies to this case because plainly it does as this case was not "final" under *Griffith* when *Booker* was rendered. Rather, the real issue is whether a new sentencing hearing should be conducted after this Court "appl[ies] ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the "plain error" test." *Booker*, 543 U.S. _____.

to a plain error analysis. *Dockery* at ____.[4] This Court is bound by the Order herein to "reconsider" this case in light of *Booker* and cannot follow a previous opinion of this Court which, in fact, failed to follow a similar direction of the Supreme Court.

(B) Remand for Resentencing is Required Under *Booker* As There Was Plain Error

Pursuant to *Booker*, this Court has held that error occurs where a district court "'applied the Guidelines as written and imposed a sentence higher than the maximum authorized solely by the jury's verdict.'" *United States v. Garcia*, ___ F.3d ___, 2005 WL 845532, *12 (11th Cir., Apr. 13, 2005) (per curiam) (emphasis added) (quoting *Booker*, 125 S. Ct. at 769). Under Eleventh Circuit jurisprudence the sentencing error under *Booker* is "not that there were 'extra-verdict enhancements' that led to an increase in the defendant's sentence, but rather that those enhancements were applied in a mandatory guideline system." *United States v. Duncan*, 400 F.3d 1297, 1302 (11th Cir. 2005) (emphasis added) (quoting

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[4] It would further be incongruous if the Court's requirements for the contents of briefs and internal rules (*United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) were held to trump an express holding of the Supreme Court that its constitutional and remedial holdings be applied to all cases on direct review or not yet final. 479 U.S. at 322-23. As the Supreme Court held in Griffith, a "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U.S. at 322.

United States v. Rodriguez, 398 F.3d 1291, 1300 (11th Cir. 2005))[5]

Mr. Triplett's sentence in "this case" violated the Sixth Amendment pursuant to the constitutional holding in *Booker* (Steven's opinion) in that it was not based upon facts admitted by him or found by a jury beyond a reasonable doubt, but based on facts found by a judge by a mere preponderance of the evidence. Furthermore, his sentence under a *Duncan* analysis violated *Booker* as it was imposed under a "mandatory guideline system."

Regardless, this Court has held that where a Sixth Amendment argument was not raised in the district court, sentencing error is reviewed for plain error. *Duncan*, 400 F.3d 1297, 1301 (11th Cir. 2005) (citing *United States v. Candelario*, 240 F.3d 1300, 1308 (11th Cir. 2001); *United States v. Sanchez*, 269 F.3d 1250, 1280 (11th Cir. 2001)).[6] The "plain error" test, as set forth by the Supreme Court in *United States v. Olano*:

---

[5] The Fourth Circuit has criticized *Rodriguez*, holding that "the constitutional error the Court identified in Booker was the same error identified in Apprendi and Blakely: the use of judge-found facts to impose a sentence in excess of the maximum authorized by the jury verdict alone," *United States v. Hughes*, 401 F.3d 540, 553 (4th Cir. 2005)

[6] As Duncan clearly was rendered prior to Dockery and Duncan, consistent with the remedial opinion of Booker directed a plan error test to be conducted if a Sixth Amendment argument had not been raised in the lower court, the Dockery court improperly failed to apply Duncan by not conducting a plain error test analysis.

> [R]equires that there be (1) error, (2) that is plain, and (3) that affects substantial rights. If these three conditions are met, an appellate court may exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Johnson v. United States, 520 U.S. 461, 468 (1997) (citing 507 U.S. 725; Fed.R.Crim.P. 52(b)). In order for an error to "affect substantial rights," "the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734 (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255-257 (1988); *United States v. Lane*, 474 U.S. 438, 454-464 (1986); *Kotteakos v. United States*, 328 U.S. 750, 758-765 (1946)). Although this Court has held that the first two prongs of the plain error test are met where a defendant is sentenced pursuant to mandatory Guidelines, it has further held that where the effect of an error is uncertain, a defendant cannot meet his or her burden in showing that the error affected his or her "substantial rights," or that the result would have been different absent the error. *Duncan*, 400 F.3d at 1302 (citing Rodriguez, 398 F.3d at 1301; citing *Jones v. United States*, 527 U.S. 373, 394-95 (1999)).

The errors in this case affected Mr. Triplett's substantial rights and the outcome of the sentencing proceedings, under the plain error test.[7] At the sentencing hearing the district court had been made aware of many facts, including that no other natural person, except Mr. Triplett, had been

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[7] Unconstitutional enhancements to a defendant's sentence affect a defendant's "substantial rights." *United States v. Milan*, 398 F.3d 445, 452 (6th Cir., Feb. 10, 2005).

prosecuted by the government for the charged conspiracy. Christopher Mealy, Valerie Mealey, Pam Wayhan, Jimmy Scruggs, Elaine Scruggs and Ted Scruggs were not prosecuted all having been identified by the government as co-conspirators with Mr. Triplett. Two corporate entities, Eurotech Industries and Pump, Valves & Equipment were allowed by the government to plead guilty and simply pay money. In short, no other person except Mr. Triplett has served *any time* for the conspiracy he stands convicted.

The alleged corporate victims' representative testified and provided direct evidence that the Henry Pratt Company not only did not lose any money, but made profits on each transaction charged in the indictment as fraudulent. (R7: 95-96) Further, the district court was well aware that Mr. Triplett at the time of sentencing was 62 years old with no criminal record having retired after 30 years from the Henry Pratt Company.

In resolving objections to the Presentence Investigation Report ("PSIR"). the sentencing judge found amounts attributable to Mr. Triplett for purported unchanged relevant conduct in the amount of $37,371.30 for H&E Engineered Equipment, Inc. conduct ("the H&E conduct"); $25,969 for Environmental Consulting, Inc. and Kathy Cain conduct ("the ECI conduct"); $21,400 for Industrial Valves Sales & Service, Inc., conduct ("the IVS conduct"); and $6,738 for Jerry Wickliffe conduct ("the Wickliffe conduct"). (R14: 38). This was in spite of the fact that the Wickliffe conduct occurred in 1998, the IVS conduct occurred in 1997 to 1998; the H&E conduct occurred in 1995 through 1997; and the ECI conduct occurred in 1994 through 1995. (R14: 33-34). The total $91,478.38 for amounts attributable from uncharged relevant conduct and to which the statute of limitations had run, when added to the asserted $199,555 calculation by the

sentencing judge for the charged offense, served to increase Mr. Triplett's offense level by eight (8), and his sentencing range above that for the offense of conviction, as established by the jury's verdict. (See R14: 46). It is exactly this uncharged conduct for which Mr. Triplett was sentenced that the constitutional opinion (Stevens, J.) in *Booker* found to be in violation of the Sixth Amendment. Mr. Triplett's Sixth Amendment rights were unquestionably violated. *Booker* at _____.

With that background, the record without question reflects that the sentencing judge was sympathetic to Mr. Triplett but felt required to impose the sentence he did due to the mandatory nature of the Guidelines:

> [T]he Congress and the President have passed Sentencing Guidelines for judges to follow. In this particular case, it's required that I sentence him to no less than 51 months, but no more than 63 months confinement with some other things.
>
> But I have had people come up and they thought it was within my power to give an individual probation. But with the Sentencing Guidelines passed by Congress, that is not the case. So let me make that clear to start with, and let me just say, Mr. Triplett, I've thought a good deal about your case, and, of course, I listened to the trial of your case. *All of us make mistakes daily, usually in driving an automobile.* Sometimes those mistakes don't have any consequences, because no other car is coming when we make the mistake and nobody gets hurt.
>
> *And then sometimes... some mistake we make does have consequences...* I can understand somewhat how

> you got into this in the years that you worked for Pratt Company and then felt like that Pratt Company had not treated you correctly at the end.
>
> But I still believe from listening to the evidence that you knew what you were doing in this. You knew it was not the right thing to do. *But I have some understanding of how you got in that position, and I also have an understand[ing] that in other business endeavors people undertake these kind of activities and don't get caught. But at any rate, here we are, and here your family is, and I consider it somewhat a tragedy for you and your family to wind up in this position at the end of your career.* But nevertheless, it's my duty to impose a sentence pursuant to the guidelines, and pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that John F. Triplett is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 51 months.

(R14: 57-58) (emphasis added). The sentencing court's statements clearly indicate that it likely would have imposed a lower sentence had it not felt constrained by the mandatory nature of the Guidelines. This assertion is buttressed by the sentencing court's subsequent comments in justifying the lower end of the guidelines. "The Court sets the sentence at the bottom of the guideline range because the Court believes that is sufficient punishment for the defendant's involvement in the instant offense and meets the sentencing goals of punishment and general deterrence."

The Second and Fourth Circuits have disagreed with the heavy burden imposed on a defendant under the third prong of the plain error test in *Rodriguez* and *Duncan*, holding that,

pursuant to the Supreme Court's decision in *Kotteakos v. United States*, the standard should be "'whether the error itself had substantial influence.'" *United States v. Hughes*, 401 F.3d 540, 550 (4th Cir. 2005) (quoting 328 U.S. 750 (1946)); *see also United States v. Williams*, 399 F.3d 450, 458 (2d Cir., Feb. 23, 2005). If a reviewing court "'cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.'" *Id.*, at __ (emphasis supplied) (quoting *Kotteakos*, 328 U.S. at 765).

The Eighth Circuit Court of Appeals has held that the government must prove that the error was harmless beyond a reasonable doubt where the error is of constitutional magnitude, or must establish that there is no "'grave doubt' as to whether the error substantially influenced the outcome of the proceedings where it is not. *United States v. Haidley*, ___ F.3d ___ (8th Cir., Mar. 16, 2005) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824 (1967); *Kotteakos*, 328 U.S. at 764-65). The Sixth Circuit Court of Appeals has gone further and adopted the approach of "presum[ing] prejudice given the distinct possibility that the district court would have imposed a lower sentence under the new post-Booker framework and the onerous burden he would face in attempting to establish that the sentencing court would have imposed such a sentence." *United States v. Barnett*, 398 F.3d 516, 529 (6th Cir., Feb. 16, 2005) (emphasis supplied).

The errors committed by the sentencing court clearly constituted error, which was "plain," and which affected Mr. Triplett's substantial rights as shown above and the outcome of the proceedings, thereby satisfying the first three prongs of the plain error test. Moreover, "under *Booker*, sentencing a

defendant on the basis of judicial fact-finding is an error that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Milan*, 398 F.3d 445, 452 (6th Cir., Feb. 10, 2005) (quoting *Johnson*, 520 U.S. at 467; citing *United States v. Cotton*, 535 U.S. 633 (2002)). This Court therefore is warranted in holding that the sentencing errors constituted plain error, and to recognize the error. Furthermore, the Second and Seventh Circuit Courts of Appeals have held that the determination of whether a defendant's sentence constituted plain error, or whether the judge would have imposed a different sentence, is to remand the case to the district court. *See Crosby*, 397 F.3d at 117; *United States v. Paladino*, ___ F.3d ____, 2005 WL 435430, *10 (7th Cir., Feb. 25, 2005). Accordingly, based on the above this Court should find Mr. Triplett's sentence "in light of *Booker*" to have violated his Sixth Amendment rights as it was plain error. Further, this Court should vacate the lower court's judgment and remand "this case" to the lower court for resentencing.

Respectfully submitted,

Wilmer Parker

APPENDIX C

United States Court of Appeals

MEMORANDUM

TO: Mr. Wilmer Parker
Ms. Andrea Liminer
FROM: Clerk's Office
RE: 03-14099 USA V Triplett
DATE: April 5, 2005

The Supreme Court having vacated this Court's previous judgment in this case and remanded for further consideration in light of *United States v. Booker*, 125 S.Ct. 738 (2005), the parties are directed to file supplemental letter briefs containing:

(1) a detailed description of where, when, and how the *Booker* issue was first raised, quoting or attaching a copy of the pertinent part of any relevant written documents (pleadings, transcripts, or briefs) showing that it was; and

(2) any arguments about whether and how the Booker decision applies to this case and what action this Court should now take in the case; those arguments should address, where relevant under the procedural facts, any arguably applicable waiver and procedural default law, including but not limited to the plain error doctrine.

The letter briefs must not exceed 15 double-spaced pages, not counting any attachments or enclosures included in response to item no. (1), above.

The defendant's letter brief is due in the Clerk's Office by noon on April 15, 2005. The government's letter brief is due in the Clerk's Office by noon on April 25, 2005. They may be faxed.

THOMAS K. KAHN, Clerk
Reply to: Regina Veals-Gillis

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 04-137

[January 24, 2005]

John F. Triplett,
Petitioner

v.

United States.

OPINION

On petition for writ of certiorari to the United States of Court of Appeals for the Eleventh Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of United States v. Booker, 543 U.S. ___, 160 L. Ed. 2d 621, 125 S. Ct. 738, 2005 U.S. LEXIS 628 (2005).

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

03-14099-DD

[Filed April 26, 2004]

UNITED STATES OF AMERICA	)
Plaintiff-Appellee,	)
	)
v.	)
	)
JOHN F. TRIPLETT,	)
Defendant-Appellant.	)
	)

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____11th Cir., 19__, _____F.2d_____).

Before: DUBINA, CARNES and HULL, Circuit Judges.

PER CURIAM

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service

on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

/s/ _____
UNITED STATES CIRCUIT JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-14099 Non-Argument Calendar

[Filed February 25, 2004]

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
v.)
)
JOHN F. TRIPLETT,)
Defendant-Appellant.)
)

Appeal from the United States District Court
for the Northern District of Georgia

Before DUBINA, CARNES and HULL, Circuit Judges.

PER CURIAM

Appellant John F. Triplett appeals his conviction and 51-month sentence for conspiracy to commit mail, wire, and honest services fraud, in violation of is U.S.C. § 371. On appeal, Triplett argues that his conviction should be reversed because the indictment was constructively amended, in that the district court allowed the government to present evidence that he was guilty of the uncharged conduct of defrauding his

employer of a right to make greater profits. He also argues that his sentence should be vacated for the following reasons: (1) uncharged conspiracies improperly were included as relevant conduct; (2) an abuse-of-trust enhancement was improper because such abuse was inherent in the charged conspiracy to commit honest services fraud; (3) a four-level role enhancement was improper because the conspiracy did not involve five or more participants; (4) the amounts of loss and restitution were miscalculated; and (5) an obstruction-of justice enhancement was improper because the obstructive conduct related to a different investigation.

Although we have not stated specifically the standard of review for appeals involving constructive amendments, we generally review an indictment's sufficiency *de novo. United States v. Ramirez*, 324 F.3d 1225, 1226 (11th Cir. 2003) (citation omitted). With respect to sentencing issues, we review the district court's findings of fact for clear error and its application of the Sentencing Guidelines to the facts de nova. *United States v. Blanc*, 146 F.3d 847, 851(1 Cir. 1998).

Triplett argues that his indictment was constructively amended and that, as a result, his conviction should be reversed. "A constructive amendment occurs when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment." *United States v. Castro*, 89F.3d 1443, 1452-53 (11th Cir. 1996) (internal citations omitted). An improper amendment can occur through either statements made by the government at trial or erroneous jury instructions. *Id.* at 1453. In determining whether an indictment was constructively amended, we look at whether the prosecutor's actions or the court's instructions "viewed in context" literally or effectively expanded the

indictment. *United States v. Behety*, 32 F.3d 503, 508-09 (11th Cir. 1994). After reviewing the record and the parties' briefs, we conclude that no constructive amendment of the indictment occurred because no change in the objects of the fraud occurred and the essential elements remained unchanged from those in the indictment.

Triplett also argues that the district court erred in counting as relevant conduct, for sentencing purposes, similar schemes in which Triplett engaged. Relevant conduct includes all acts and omissions committed by the defendant "that were part of the same course of conduct or similar common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). Offenses that are "substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar **modus operandi**" qualify as a common scheme or plan. U.S.S.G. § 1B1.3, comment. (n. 9(A)). We conclude that all of the transactions shared sufficient common factors to have arisen from a common scheme or plan. Thus, the district court did not clearly err in counting the transactions as relevant conduct.

Triplett contends that the district court erred in applying an abuse of trust enhancement pursuant to U.S.S.G. § 3B1.3, which provides for a two-level enhancement " the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. Whether a defendant occupied a position of trust meriting application of the enhancement is viewed from the perspective of the victim of the crime. *United States v. Garrison*, 133 F.3d 831, 837 (11th Cir. 1998). We conclude that the district court properly applied the abuse-of-trust enhancement because the jury convicted Triplett not only of depriving Pratt of honest services, but also for conspiring to use mail and interstate

wire to defraud Pratt and obtain money from Pratt by false pretenses, offenses for which abuse of trust is not included in the base offense level. Furthermore, Triplett was granted almost unquestioned authority with regard to his duties. Therefore, Triplett abused a position of trust in a manner that significantly facilitated the commission of the offense. *Id.* at 838 ("Since the 'primary concern of 3B1.3 is to penalize defendants who take advantage of a position that provides them freedom to commit or conceal a difficult-to-detect wrong,' only such a defendant whose position enables or significantly facilitates the offense is eligible for this enhancement.").

Triplett next argues that the district court erred by applying a four-level enhancement because the conspiracy did not involve five or more participants. A "participant" is "a person who is criminally responsible for the commission of the offense, but need not have been convicted." U.S.S.G. § 3B1.1, comment. (n.l). We conclude that, taking into account all of Triplett's relevant conduct, sufficient evidence existed to indicate that the conspiracy indeed involved five or more participants, so that the district court did not err in applying the enhancement.

Triplett argues that the district court erred in calculating the amount of loss and in ordering restitution because Pratt made a profit on each refurbished surplus valve that it sold. Triplett argues that because Pratt made a profit, Pratt did not suffer a loss or "economic harm." Once the district court has established that a loss has occurred, it is required only to "make a reasonable estimate of the loss, given the available information." *United States v. Yeager*, 331 F.3d 1215, 1224 (11th Cir. 2003). We conclude that the government established sufficiently that, although Pratt made a profit on each resale, it still lost money due to the inflated prices that

Triplett and his co-conspirators were charging because it could not attain its target profit margin and that the district court did not err in making a reasonable calculation of the amount of that loss. Accordingly, the district court did not err in ordering restitution.

Finally, Triplett argues that the district court erred by enhancing his sentence based on its finding that he obstructed justice. Because Triplett destroyed documents during the investigation of his kickback activities and attempted to influence the testimony of potential witnesses, we conclude that the district court did not clearly err by applying an obstruction of justice enhancement to his offense level.

Based on the foregoing, and because we conclude there is no merit to any of the issues Trip argues in this appeal, we affirm his conviction and sentence.

AFFIRMED.

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 1:02-CR-718-CAP

[Filed July 31, 2003]

UNITED STATES OF AMERICA)
)
v.)
)
JOHN F. TRIPLETT)
)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant was found guilty by jury on Count(s) 1 of the Indictment.

Accordingly, the defendant is adjudged guilty of such count(s) which involves the following offense:

Title & Section	Nature of Offense	Count No
18 USC § 371	Conspiracy to Commit Mail, Wire and Honest Services Fraud	1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay the special assessment of $100.00 which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendants Soc. Sec. No. 369-38-6672
Date of Imposition of Sentence: July 23, 1940
Defendant's Date of Birth: July 31, 2003
Defendant's Mailing Address:
365 Royal Birkdale Court
Duluth, Georgia 30097

Signed this the 31st Day of July, 2003.

/s/ Charles A. Pannel, Jr.
UNITED STATES DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Fifty-One (51) months.

The Court recommends the Atlanta Federal Prison Camp, Elgin Air Force Base or Maxwell Air Force Base.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as notified by the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_

Defendant delivered on_____ to _____

at _____ ,with a certified copy of this judgment.

/s/ _____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) years.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard and special conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution

that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released.

The defendant shall not own, possess or have under his control any firearm, dangerous weapon or other destructive device.

The defendant shall submit to a search of his person, property, real or personal, residence, place of business or employment, and/or vehicle(s) at the request of the United States Probation Officer.

The defendant shall make a full and complete disclosure of finances and submit to an audit of financial documents, at the request of the United States Probation Officer.

The defendant shall pay any financial penalty that is imposed by this judgment.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.

The defendant shall pay any portion of the restitution that is not paid in full at the time of the defendant's release from imprisonment shall become a condition of supervision and be paid at the monthly rate of $150.00 plus 25% of any gross monthly income in excess of $2,000.00.

The defendant shall pay any portion of the fine that is not paid in full at the time of the defendant's release from imprisonment shall become a condition of supervision and be paid at the monthly rate of no less than $500.00.

The periodic drug testing mandated by the Violet Crime Control and Law Enforcement Act of 1994 is hereby suspended. The Court finds this offense is not drug related, and the defendant has no current or past history of substance abuse.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the

defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine in the amount of $10,000.00 and the fine shall be paid in full immediately. If the defendant is unable to make an immediate payment, he shall make fine payments from any wages he may earn in prison in accordance with the Bureau of Prisons Financial Responsibility Program. Any portion of the fine that is not paid in full at the time of the defendant's release from imprisonment shall become a condition of supervision and be paid at the monthly rate of $500.00.

If the fine is not paid, the court may sentence this defendant to any sentence which might have been originally im posed. See 18 U.S.C. 3614

RESTITUTION

The defendant shalt make restitution to the following Company in the following amount:

Name of Payee	Amount of Restitution
The Henry Pratt Company 401 South Highlands Avenue Aurora, Illinois 60506	$86,512.02

The restitution shall be paid in full immediately. If the defendant is unable to make an immediate payment, she shall make restitution payments from any wages she may earn in prison in accordance with the Bureau of Prisons Financial

Responsibility Program. Any portion of the restitution that is not paid in full at the time of the defendant's release from imprisonment shall become a condition of supervision and he paid at the monthly rate of $150.00 plus 25% of any gross monthly income in excess of $2,000.00.

The defendant shall notify the United States Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

FILED
OCT 7 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-196

In the Supreme Court of the United States

JOHN F. TRIPLETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
THOMAS O. BARNETT
Acting Assistant Attorney General
JOHN J. POWERS III
ANDREA LIMMER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals abused its discretion by holding that petitioner had abandoned a claim of error under *United States* v. *Booker*, 125 S. Ct. 738 (2005), by raising it for the first time in his petition for a writ of certiorari.

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In the Supreme Court of the United States

No. 05-196

JOHN F. TRIPLETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction and sentence (Pet. App. 22a-26a) is unpublished, but the judgment is noted at 99 Fed. Appx. 882 (Table). The opinion of the court of appeals reinstating its prior judgment on remand from this Court (Pet. App. 1a-3a) is not published in the *Federal Reporter*, but is available at 128 Fed. Appx. 165.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2005. The petition for a writ of certiorari was filed on August 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 371, by failing to disclose to his employer that he had an ownership interest in nuclear-plant valves that he had purchased on his employer's behalf and that he had received substantial kickbacks on the transactions. Pursuant to the Sentencing Guidelines, the district court imposed a sentence of 51 months of imprisonment and a $10,000 fine. Pet. App. 27a-28a, 33a.

2. On appeal, petitioner alleged that the indictment in his case had been constructively amended and that the district court had erred in various ways in its application of the Guidelines. See Pet. App. 22a-26a. Petitioner raised no constitutional challenge to judicial factfinding at sentencing (nor had he done so in the district court). On February 25, 2004, the court of appeals affirmed petitioner's conviction and sentence in an unpublished per curiam decision. *Ibid.* Petitioner filed a petition for rehearing, which the court of appeals denied on April 26, 2004. See *id.* at 20a-21a.

3. On June 24, 2004, this Court decided *Blakely* v. *Washington*, 542 U.S. 296 (2004), holding that judicial factfinding that increased a state guidelines sentence violated the Sixth Amendment. On July 22, 2004, petitioner filed a petition for a writ of certiorari in which he argued for the first time that his sentence violated his Sixth Amendment rights because the district court imposed sentencing enhancements based on facts not found by the jury. See Pet. 23-29, *Triplett* v. *United States*, 125 S. Ct. 994 (No. 04-137).

4. On January 12, 2005, this Court decided *United States* v. *Booker*, 125 S. Ct. 738 (2005), holding that the Sixth Amendment, as construed in *Blakely*, applies to the federal Sentencing Guidelines. *Id.* at 746-748. In answering the remedial question in *Booker*, the Court applied severability analysis and held that the Guidelines are advisory rather than mandatory and that federal sentences are reviewable for unreasonableness. *Id.* at 757-769.

On January 24, 2005, the Court granted petitioner's petition for writ of certiorari, vacated the judgment, and remanded the case to the court of appeals for further consideration in light of *Booker*. Pet. App. 19a.

5. On remand, the court of appeals reinstated its original judgment. Relying on circuit precedent, the court stated that it will not ordinarily consider issues not raised in an appellant's initial brief on appeal. Pet. App. 2a-3a (citing *United States* v. *Dockery*, 401 F.3d 1261 (2005) (per curiam), petition for cert. pending, No. 05-5714 (filed Aug. 5, 2005); *United States* v. *Ardley*, 242 F.3d 989 (11th Cir.), cert. denied, 533 U.S. 962 (2001) and 535 U.S. 979 (2002)). The court of appeals stated that it saw nothing

> in the Supreme Court's remand order, which is cast in the usual language, requiring that we treat the case as though the * * * issue had been timely raised in this Court. . . . In the absence of any requirement to the contrary in either [*Booker*] or in the order remanding this case to us, we apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned.

Ibid. (quoting *Ardley*, 242 F.3d at 990). Accord, *e.g.*, *United States* v. *Levy*, 416 F.3d 1273, 1279-1280 (11th Cir. 2005) (per curiam) (reinstating the original judgment after this Court granted certiorari, vacated the judgment, and remanded for further consideration in light of *Booker*); *United States* v. *Mosley*, 140 Fed. Appx. 41 (11th Cir. 2005) (per curiam) (same), petition for cert. pending, No. 05-6086 (filed Aug. 24, 2005). The court emphasized that petitioner had raised the claim for the first time in his petition for a writ of certiorari. Pet. App. 2a.

ARGUMENT

1. Petitioner contends (Pet. 8-18) that the Eleventh Circuit's practice of treating as abandoned *Booker* and *Blakely* claims that are not raised in a party's initial brief contravenes the retroactivity principle of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), and conflicts with the law of other circuits that "at minimum, * * * consider an appellant's *Booker* claim pursuant to this Court's 'plain error' test." Pet. 12. Petitioner also contends (Pet. 19-23) that the court of appeals' decision undermines this Court's mandate directing that his case be reconsidered in light of *Booker*. Those arguments lack merit. For the reasons set forth at greater length in the government's briefs in opposition in other cases challenging the Eleventh Circuit's application of its procedural default rule, see, *e.g.*, Br. in Opp. at 5-17, *Tugman* v. *United States*, petition for cert. pending, No. 04-1387, the court's application of that rule is consonant with retroactivity principles and there is no conflict among the circuits that warrants this Court's review.[1]

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[1] We have provided petitioner with the government's brief in opposition in *Tugman*.

a. The Court concluded in *Griffith* v. *Kentucky*, *supra*, that retroactive application of new rules on direct appeal is necessary both because of "the nature of judicial review" and in order to "treat[] similarly situated defendants the same." 479 U.S. at 323. That rationale is in no way inconsistent with application of procedural default rules to bar consideration of claims that have not been adequately preserved. Defendants who have not preserved a claim of error are not "similarly situated" (*ibid.*) to those who have. *Cf. Shea* v. *Louisiana*, 470 U.S. 51, 59-60 (1985) (holding that it is not inequitable to draw a distinction between a defendant who raises a claim on collateral attack and one who raises it on direct review because "[t]he one litigant already has taken his case through the primary system," while "[t]he other has not").

b. Contrary to petitioner's contention, Pet. 19-23, the court of appeals' decision does not contravene this Court's order remanding the case "for further consideration in light of [*Booker*]." Pet. App. 19a. This Court expressly said in *Booker* that not "every appeal will lead to a new sentencing hearing." 125 S. Ct. at 769. The Court "expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." *Ibid.* *Booker* indicated that "plain-error" is only one of a number of "prudential doctrines" that may preclude relief. *Ibid.* Abandonment is another. Indeed, this Court in *Pasquantino* v. *United States*, 125 S. Ct. 1766, 1781 n.14 (2005), applied its own prudential doctrines to decline to vacate a sentence for further consideration in light of *Blakely* when the request was made for the first time in the petitioners' merits brief and "[p]etitioners did not raise this claim

before the Court of Appeals or in their petition for certiorari." "It seems relatively obvious that if the Supreme Court may apply its prudential rules to foreclose a defendant's untimely *Blakely*, now *Booker*, claim, there is no reason why [the Eleventh Circuit] should be powerless to apply its prudential rule to foreclose [a] defendant's * * * untimely *Blakely*, now *Booker*, claim." *United States* v. *Levy*, 416 F.3d 1273, 1277 (11th Cir. 2005) (per curiam); accord *United States* v. *Smith*, 416 F.3d 1350, 1354 (11th Cir. 2005) (per curiam).

c. Petitioner contends (Pet. 19-22) that the decision below conflicts with *Stutson* v. *United States*, 516 U.S. 193 (1996) (per curiam). That argument lacks merit. *Stutson* involved whether a criminal defendant was eligible for relief from the untimely filing of a notice of appeal because the delay in filing was the result of "excusable neglect" within the meaning of Rule 4(b) of the Federal Rules of Appellate Procedure. The government had argued in the court of appeals that the "liberal understanding of [the] 'excusable neglect'" language of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure embodied in this Court's decision in *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), was limited to the bankruptcy context and did not apply to criminal cases like the one at issue in *Stutson*. See *Stutson*, 516 U.S. at 194. The court of appeals affirmed without opinion. In this Court, the government abandoned its earlier position and argued that the reasoning of *Pioneer* applied equally to criminal cases under the Federal Rules of Appellate Procedure. See *id.* at 194-195. Based in part on the government's concession, this Court granted the petition, vacated the judgment, and remanded to the court of appeals for further consideration in light of *Pio-*

neer. Nothing in that decision, which simply "invit[ed] [the court of appeals] to clarify its ambiguous ruling," *Id.* at 196, suggests that courts may not apply procedural bar rules to claims based on intervening decisions of this Court.

d. This Court has denied review in a number of cases in which the Eleventh Circuit declined to entertain a claim under the intervening decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), solely because it was not raised in the petitioner's opening brief, see, *e.g.*, *Ardley* v. *United States*, 535 U.S. 979 (2002) (No. 01-8714); *Nealy* v. *United States*, 534 U.S. 1023 (2001) (No. 01-5152); *Padilla-Reyes* v. *United States*, 534 U.S. 913 (2001) (No. 01-5284), and the Court has denied review in several cases that specifically challenged application of the procedural bar rule in that context. See, *e.g.*, *Phillips* v. *United States*, 536 U.S. 961 (2002) (No. 01-5718) (denying review when petitioner challenged application of rule to bar consideration of *Apprendi* claim); *Garcia* v. *United States*, 534 U.S. 823 (2001) (No. 00-1866) (denying review when Eleventh Circuit declined, on remand from this Court for reconsideration in light of *Apprendi*, to consider claim because it was not raised in initial brief); see also *Thompson* v. *United States*, 535 U.S. 1114 (20[illegible] (No. 01-8603) (denying petition that challenged application of rule to bar consideration of ex post facto claim). There is no reason for a different result in this case.

Review should also be denied because the application of the Eleventh Circuit's procedural default rule to *Blakely* and *Booker* claims is a transitional issue of limited continuing importance. This issue arises most frequently in cases currently on appeal in which the sentence was imposed before this Court's decision in

Blakely, when sentencing courts treated the Guidelines as mandatory and defendants did not routinely raise Sixth Amendment challenges to judicial factfinding under the Guidelines. As this case itself demonstrates, this Court's decision in *Blakely* put many defendants and courts on notice of the potential for error. After *Blakely*, most defendants who wish to raise Sixth Amendment challenges to sentencing on appeal do so in a timely manner in their opening briefs. This issue should arise rarely or never in appeals briefed after *Booker* because defense counsel are now well aware that the Guidelines are not binding under that decision. This issue thus affects a limited number of cases and can be expected to be of steadily decreasing significance by the time this Court would be able to hear argument on and decide this issue.

This Court recently denied review in *Rodriguez* v. *United States*, 125 S. Ct. 2935 (2005) (No. 04-1148), which involved the application of the plain-error rule, Fed. R. Crim. P. 52(b), to *Booker* error, although that issue implicated a clear conflict in the circuits. U.S. Br. at 7, *Rodriguez*, *supra* (No. 04-1148). The Court's denial of certiorari in *Rodriguez* is consistent with the fact that it, like this case, presented a "transitional issue * * * [of] limited continuing importance once the cases in which sentences were imposed before *Booker* have become final." *Ibid.* The same conclusion is warranted here.

2. Petitioner is correct (Pet. 23-25) that there is a conflict in the circuits on the proper application of the plain-error test to claims of *Booker* error. That conflict is further analyzed in the government's brief in *Rodriguez*. See U.S. Br. at 11-18, *Rodriguez*, *supra* (No. 04-1148). The petition for a writ of certiorari in *Rodriguez*

presented the same plain-error issue petitioner raises and alleged the same circuit conflict. Pet. at 7-12, *Rodriguez*, *supra* (No. 04-1148). The government suggested in *Rodriguez* that this Court grant certiorari in order to resolve the conflict in the circuits, U.S. Br. at 7, *Rodriguez*, *supra* (No. 04-1148), but the Court denied review. 125 S. Ct. 2935. There are no circumstances that would warrant a different result in this case.

In any event, the *Rodriguez* issue is not implicated here. The petitioner in *Rodriguez* properly presented his plain-error claim under *Booker* by raising it in his opening brief. See *United States* v. *Rodriguez*, 398 F.3d 1291, 1297 (11th Cir.), cert. denied, 125 S. Ct. 2935 (2005). Because the court of appeals deemed petitioner to have abandoned his *Booker* claim by raising it only after briefing in his case was complete, that court did not have occasion to apply plain-error principles to the claimed error. This Court "do[es] not ordinarily address for the first time * * * an issue which the Court of Appeals has not addressed." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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